No. 94-191

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Supreme Court of the United States

October Term, 1994

LEE S. RUMSEY, DOUGLAS DIGERLANDO, MICHAEL RHODES and THOMAS GRAVES, Individually and as Representatives of a Class of Persons Similarly Situated,

Petitioners,

against

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES and THOMAS COUGHLIN, III, as Commissioner of the New York State Department of Correctional Services,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONERS

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I. Recent Discussions in the United States House of Representatives on a Pending Amendment to the Veterans' Act indicates *Rumsey* was wrongly reversed by the Second Circuit.

Pursuant to Rule 15.7 of the Supreme Court Rules, petitioners call to the attention of the Court recent language in the U.S. House of Representatives regarding new legislation enacted after submission on the petition herein. Less than two weeks ago, on September 13, 1994, the House passed H.R. 995, a House-Senate conference committee bill, entitled "Uniformed Services Employment and Reemployment Rights Act of 1994," which amends the Veterans' Reemployment Rights Act ("VRRA") to prohibit the denial of "any benefit" of employment; the statutory definition of "benefit" includes "the opportunity to select work hours." H.R. 995, 103rd Cong. 2d Sess., 140 Cong. Rec. H9117, §§4303(2), 4311(a) (1994).

As explained on the House floor by the Honorable G.V. Montgomery, Chairman of the House Veterans' Affairs Committee, immediately before passage of the bill, the new language represents a *clarification,* not amendment, of existing law:

> *I want to express the committee's strong disagreement with the recent decision in Rumsey v. N.Y. State Dept. of Corr. Services,* 19 F.3d 83 (2nd Cir. 1994), which limited the protection given reservists on active duty for training only to "substantial rights" such as discharge, demotion, or failure to promote. While the amended act speaks in terms of "benefit, benefits of employment or rights and benefits," and

> no longer uses the term "incident or advantage of employment," *the intent has always been to have an expansive interpretation,* such as that expressed by the sixth circuit in *Monroe v. Standard Oil Co.,* 613 F.2d 641, 645 (6th Cir. 1980), aff'd. 452 U.S. 549 (1981). "[I]ncidents or advantages of employment . . . is intentionally framed in general terms to encompass the potential [*sic*] limitless variation in benefits of employment that are conferred by an untold number and variety of business concerns." [emphasis supplied]

140 Cong. Rec. H9133 (daily ed. September 13, 1994) (statement of Rep. G.V. Montgomery).

In its Committee Report a year earlier, accompanying the bill, the Veterans' Affairs Committee expressly approved the decision of the Trial Court in this case below as standing for the proposition that "an employer cannot require servicemembers to reschedule their work week because of a conflict with reserve or National Guard duty, unless all other employees who miss work are required to reschedule their work." H.R. Rep. No. 65, 103rd Cong., 1st Sess. pt. 1 at 33-34 (1993).

II. Employer allegations of past military leave "fraud" or "abuse" by some employees do not constitute a defense to a discrimination claim under the Veterans' Act.

Respondents repeatedly suggest throughout their opposition brief that they were justified in treating employee-reservists differently from non-reservist co-workers be-

cause some employee-reservists may have abused military leave in the past. (See Brief for Respondents in Opposition, August 26, 1994, pp. 3 ["mitigation of abuse"], 8 ["in order to avoid abuse", "undertaken to reduce documented abuse"], 9 n. 5 ["reduction of fraud"]).

This suggestion is a thinly veiled attempt to divert the Court's attention from the legal issue at bar and to prejudice petitioners. Respondents cite no decisional or statutory law to support this as a valid defense to a Veterans' Act claim. No evidence has been provided in this record to prove a case of fraud against any individual petitioner. If certain individuals had committed fraud, as respondents claim, the employer had ample recourse available to it against the alleged wrongdoers.

With respect to this particular case, respondents' "abuse argument" is plainly irrelevant. Kevin Breen, Director of Labor Relations for the New York State Department of Correctional Services, admitted under questioning by the Court itself that the alleged past abuse, while prompting more strict *verification* requirements with respect to military drill attendance, had nothing to do with institution of Directive 2212's *rescheduling* provision at issue in this case:

> The Court: Now, those [verification] requirements in and of themselves could have served the purpose of eliminating abuse, could they not?
>
> The Witness: Yes, sir.

Joint Appendix on Appeal to the Second Circuit, p. 297.

Thus, the District Court specifically found that the purpose of pass day rescheduling was to increase manpower and thereby reduce overtime, not to address alleged abuse. (Petition for Writ of Certiorari, No. 94-191, Appendix "E" p. 56a).

Petitioners respectfully submit that this Court reject respondents' suggestion that an employer be allowed to discriminate against all employee-reservists by merely alleging that some may have engaged in prior wrongdoing.

III. Based upon *Gilman*, the United States Department of Labor would conclude that the Second Circuit erred in failing to find a violation under 4301(b)(3) of the Veterans' Act.

Respondents imply, at page 7 n. 4 of their Brief in Opposition, by citing selected language from an advisory opinion entitled *Gilman v. Iowa Penitentiary,* Case No. 62-7019 (1981), that the Second Circuit's holding denying a violation of the Veterans' Act comports with the United States Department of Labor's policy on this matter.

For the Court's convenience, petitioners have annexed to this brief as Appendix "A" (*infra* at p. 1a-5a), a complete copy of that internal memorandum, including the paragraph between those paragraphs cited by respondents at footnote 4. In that paragraph, omitted by respondents, the Solicitor distinguishes the *Gunnar M. Stevens* case from *Gilman,* relying on the fact that in *Stevens*, "as a perquisite of seniority, employees bid on the specific days they desired to

have off. . ." while the claimant in *Gilman* apparently had no such seniority right. This distinction is found by the Solicitor to be determinative (Appendix "A", *infra*, p. 3a).

In this case, all Courts have found and respondents admit in the second sentence on page 8 of their opposing brief: "Significantly, employees bid on these [pass day] schedules according to seniority. . . ." As in *Gilman*, then, where "having certain days off is a right accruing by seniority" to all employees that right warrants protection under the statute. *Gilman*, p. 3a, *infra*, citing *Alabama Power v. Davis*, 431 U.S. 581 (1977); *Lott v. Goodyear Aerospace Corp.*, 395 F.Supp. 866 (N.D. Ohio, 1975).

CONCLUSION

A Writ of Certiorari should be granted to review the Second Circuit's holding that Section 4301(b)(3) of the Veterans' Act was not violated.

Dated: September 20, 1994
Albany, New York

Respectfully submitted,

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APPENDIX A—*Gilman v. Iowa State Penitentiary*, U.S.D.O.L., Veterans' Reemployment Rights Case No. 62-7019 (1981)

May 4, 1981
KCL:KFTL:DRB

TO:
Tedrick A. Housh, Jr.
Regional Solicitor

SUBJECT:
Iowa State Military Leave Policy
Thomas E. Gilman v. Iowa State Penitentiary
Reemployment Rights Case No. 62-7019(36)
SOL No. 06617-OP

This is in response to a request for an opinion from LMSA.

Issue

Does the Iowa State Military Leave Policy which, as interpreted by the state attorney general's office, permits public employers to schedule a reservist's days off so as to coincide with his military training, violate the provisions of Title IV of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (38 U.S.C. 2021 *et seq.*), hereinafter referred to as the Act?

Facts

Thomas E. Gilman was employed as a guard at the Iowa State Penitentiary in Fort Madison. Mr. Gilman, normally, received Sundays and Mondays off. It is the policy of the prison officials as directed by the Iowa State Department of Social Services to require employees who attend military drills to change their scheduled off days to coincide with their military obligations. In accordance with this policy, Gilman's regular off days were changed for the week of his drill to Saturday and Sunday. He refused to work the following Monday, December 1, 1980, and was terminated.

Recently the Iowa Legislature enacted into law several revisions to the Iowa Military Code. In interpreting these new sections the state attorney general sanctioned the idea of an employer "scheduling around" an employee's military obligations. This interpretation created the dilemma faced by the veteran.

Analysis

38 U.S.C. 2021(b)(3) states:

> Any person who holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

The obvious question posed is whether Iowa's attorney general's opinion, *supra,* conflicts in any way with this

federally bestowed right, thus making it invalid. It is necessary to further define "other incident or advantage of employment" to see if "scheduling around" is within the purview of this section. Fortunately the legislative history pertaining to this section provides the necessary guidance as to its meaning and intention. Essentially it means that reservists are entitled to the same treatment afforded coworkers not having military obligations. See U.S. Code Cong. & Admin. News p. 3421 (1968). Scheduling has always been a management prerogative, and it is assumed that scheduling is an essential element in operating efficiency. The allocation of resources in any endeavor must be efficient if success is to be realized. A reservist is in no way penalized by being scheduled to be off on those days coincidental with his military duty. The Iowa attorney general makes the point that in the event a loss of pay were to occur any reservist, such as Mr. Gilman, would be entitled to pay up to thirty (30) days a year.

This request makes reference by analogy to *Gunnar M. Stevens v. City of Oceanside* a case referred to Justice by the San Francisco Regional Solicitor's Office. An analysis quickly shows the stark legal differences between these situations. In *Gunnar M. Stevens,* the veteran was employed as a police officer by the city of Oceanside. It appears that as a perquisite of seniority, employees bid on the specific days they desired to have off with the most senior people naturally having the better selections. This was the only method of scheduling used by the city of Oceanside. Immediately then this casts the issue in a different light, namely that having certain off days is a right accruing by virtue of seniority. *See* e.g. *Alabama Power v. Davis,* 431 U.S. 581, 97 S.Ct. 2002 (1977). *Lott v. Goodyear Aerospace Corp.,* 395 F.Supp. 866 (N.D. Ohio 1975) was cited as authority to

support that veteran's claim. In *Lott* the veteran was charged for overtime.[1] He was scheduled to work on those weekends he had military drills. The court found this discriminatory towards the veteran since he had no other choice but to refuse it while other employees had two choices of working or refusing to work overtime. Again the issue is a perquisite of seniority. Overtime was assigned on that basis, thus bringing it clearly within the scope of the statute.

In the present case the issue is simply scheduling off days. Except in those instances where the scheduling is done exclusively by seniority, it should not be construed as an incident of employment, but rather a management prerogative. This even becomes more valid when juxtaposed against the veteran's real gripe that he needs the rest afforded by off days. It takes little imagination to compare the veteran here with those individuals who work a normal workweek and still have the same military obligation to fulfill on weekends. Consequently, to construe the Act to permit individuals to get extra days for rest in weeks they have reserve duty would be an absurd result.

This issue must be distinguished from those situations which would require a veteran to work a shift from 11:00 P.M. to 7:00 A.M. and report to military duty at 8:00 A.M. the same day. The same would be true if the veteran is required to report to work at 7:00 A.M. if he returns from drill at 2:00 or 3:00 A.M. the same day. The Congressional intent of reasonable accommodation to a veteran will certainly be violated in these situations since they would require the veteran to report to work or to reserve duty with little or no rest on the same day.

---

[1]This is the process of equalization. Its purpose is to provide the opportunity to work overtime when available and the intent is to schedule the employees with the least overtime first.

We are mindful provisions of the Act should always be liberally construed to effectuate the intentions of Congress in ensuring that veterans and reservists are protected. This, however, must be tempered with reason and common sense. The Iowa attorney general's opinion, when taken in context, does not violate rights of the reservist under the federal statute.

s/Keithley F. T. Lake
KEITHLEY F. T. LAKE
Attorney

Attachment: File